Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-2040

ULESS GRANT MANSON,
GEORGE JUNIOR BLAKEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. _____

ULESS GRANT MANSON,
GEORGE JUNIOR BLAKEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRI ' OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioners, each separately and jointly, pray that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings, on the 9th day of April, 1974, Petition for Rehearing denied without opinion by the said Court on June 19, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, has not been officially reported.

However, that opinion and the ruling on the Petition for Rehearing are set out as "Appendix A" hereto.

JURISDICTION OF THIS COURT

The basis for jurisdiction of this Court is found in Title 28 U.S.C. 1254(1):

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of Certiorari granted upon the petition of either party to any civil or criminal case, before or after rendition of judgment or decree.

Questions Presented for Review

The questions presented for review are:

1. Whether or not Title 18 U.S.C., Sec. 1955 is unconstitutional;

2. Whether the petitioners' constitutional rights, as guaranteed by the Fifth Amendment to the Constitution of the United States, as against self-incrimination, were violated by the admission of certain required income tax documents into evidence at their trial.

Constitutional Provisions

> (1) The Congress shall have power to . . . (3) to regulate commerce with foreign nations, and among the several states, and with Indian tribes. . . .
>
> (18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution of the government of the United States, or in any department or office thereof, Article 1, Section 8, Clauses 1, 3 and 18 of the Constitution of the United States.

(a) The powers not delegated to the United States, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Amendment 10, Constitution of the United States.

No person shall be held to answer for a capital, otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. 5th Amendment to the Constitution of the United States.

Statutes Involved

Title 18 U.S.C. 1955, the statute whose constitutionality is challenged, reads as follows:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000.00 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "Illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and con-

ducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more consecutive days, then, for the purpose of obtaining warrant for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000.00 in any single day shall be deemed to have been established.

Title 26, U.S.C. 7203, reads as follows:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, C. 736, 68 A, Stat., 851.

Reasons For Granting Writ

The Petitioners assert that the Writ of Certiorari should be granted for the following reasons:

1. Title U.S.C. 1955 is an unlawful extension by Congress of its vested powers under the Commerce Clause of the United States Constitution.

2. The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decision of another court of appeals on the same matter, and has decided a federal question in a way in conflict with applicable decisions of this Court, in their Opinion, that the admission of income tax records of the petitioners into evidence over objection, did not violate the petitioners' constitutional guarantees under the Fifth Amendment to the Constitution of the United States. *Marchetti v. U.S.*, 390 U.S. 50.

STATEMENT OF THE CASE

This was a criminal prosecution, commenced by way of indictment in the United States District Court for the Southern District of Indiana, against the petitioners, for violation of Title 18 U.S.C., Section, 1955, and Title 18 U.S.C. 371, in two counts.

The petitioners filed their Motion to Dismiss the Indictment asserting the unconstitutionality of 18 U.S.C. 1955, which motion was denied by the Court.

Trial was had, without intercession of a jury, and the petitioners were convicted on both counts of the indictment and the petitioner, Manson, was sentenced to three (3) years imprisonment on each count, of which two (2) years and ten (10) months were suspended and a fine of $5,000.00 was imposed on each count.

The petitioner, Blakey, was sentenced to three (3) years imprisonment, of which two (2) years, eleven months was suspended, and a fine of $3,000.00 was imposed on each count.

Both petitioners were ordered placed on probation after completion of their executed sentences for the remaining portion of their suspended sentences.

During the course of the trial, the government introduced a certain income tax form, commonly referred to as a W-2 Form or a 1099, which had been filed by him with the Internal Revenue Service, the said form having been supplied to him by the petitioner, Manson, as required by law.

The form was admitted into evidence, over objection and showed that the income so reported was received from a gambling operation.

The United States Court of Appeals for the Seventh Circuit, in their opinion, held:

"It is evident that the Appellants had no standing to object to the introduction of Mr. Kelley's tax return, for the reason that the privilege of self-incrimination is personal and cannot be exercised by anyone other than the person to whom the material in question belongs.

The United States Court of Appeals did however, reverse the conviction of the Appellants from their conviction under Count I, for Violation of 18 U.S.C. 371.

ARGUMENT

Point I

The issue under Point I centers on this United States Court of Appeals' decision, upholding the findings of the United States District Court for the Southern District of Indiana, that 18 U.S.C. is constitutional.

The petitioners would assert to this Court that the illegal gambling activity complained of was, as the record will clearly show, an intrastate activity. It is further clear that no organized criminal activity was shown on the part of the petitioners.

The petitioners would further argue that the United States Government has no police powers, and that the only justification for a Federal penal statute, such as the one in question, must be founded upon the commerce clause of the United States Constitution, and as embodied by the language found in *Gibbons v. Ogden*, 9 Wheat 1, 195, 6 L. Ed. 23, 70, (1824), whereby Justice Marshall speaking for this Court stated:

> "The completely internal commerce of a state, then may be considered as reserved for the state itself."

See also, Champion v. Ames, 188 U.S. 321, 23 S. Crt. 321, 47 L. Ed. 492. 502 (1903).

It is submitted that irregardless of a finding by Congress, to the extent that purely intrastate gambling *could* have a sufficient impact on interstate commerce and economy, the fact remains that the passage of such a statute exceeds the constitutional authority, vested in the Congress of the United States.

Point II

The income tax forms admitted into evidence clearly showed:

(1) That the petitioners were involved in illegal gambling.

(2) That they were involved as a gambling partnership.

The United States Court of Appeals for the Seventh Circuit reasoned that inasmuch as the tax forms were furnished by the Appellants, to an employee, all as required by the Internal Revenue Code, then they were in no position to assert their constitutional privilege against self-incrimination as guaranteed by the Constitution of the United States.

The petitioners assert that such reasoning and resulting opinion "fly into the teeth" of this Court's opinions in *Marchetti v. U.S.*, 390 U.S. 39, 19 L. Ed. 889, 88 S. Crt. 697 (1968) and *Grosso v. U.S.* 390 U.S. 62, 19 L. Ed. 2d 906, 88 S. Crt. 709.

In Marchetti, the defendant was convicted for a violation of federal wagering tax statutes, particularly failure to register as a gambler as required by law.

The defendant failed, as required by law, to submit to the Internal Revenue Service certain forms, indicating that they were engaged in the business of accepting wagers, and required to list the names and addresses of agents and employees.

This Court, in reversing the Second Circuit Court of Appeals' decision stated "the prosecuting authorities must establish that their evidence was untainted by any incrimination obtained as consequence of wagering taxes."

In United States v. Sullivan (1927) 274 U.S. 259, the Supreme Court held that a person could not refuse to file Federal income tax forms on the grounds that it may incriminate him. Therefore, under this doctrine if a gambler fails to provide the tax information, he subjects himself to criminal prosecution. However, if he provides the information, he is then liable to prosecution for alleged gambling.

There can be no question, then, that the petitioners were required under Title 26, U.S.C. 7203, to provide the taxing information to the employee (Kelley), under threat of criminal prosecution.

The Court of Appeals reasons that the submission to a statutory compulsion constituted a waiver of the right to object to the use of the incriminating disclosure. However, we believe that the opinion rendered by the United States Court of Appeals in *Garner v. U.S.*, No. 71-1219—June 5, 1972, (unreported) is applicable to this case, and is directly on point.

Garner, as were the petitioners herein, was convicted for conspiring to violate federal gambling laws. At his trial, his income tax returns were admitted into evidence, as proof of the crime charged.

In reversing the Court of Appeals, in their opinion and citing Marchetti (supra), stated:

> "Although the reporting of incriminatory information on the tax returns would not perhaps have the direct and immediate effect of incriminating a taxpayer, as did the reporting of such information on returns required only of those engaged in criminal activities, we are not persuaded that such information must be the first "link in the chain" of incriminatory evidence to be objectionable. Nor are we persuaded that appellant's right to object to making this disclosure in the first instance . . . recognized ever since *Sullivan supra*

—was lost by appellant's submitting to the statutory requirement of reporting. We cannot sanction waivers of constitutional rights "without the most deliberate examination of the circumstances surrounding them . . ." *Marchetti, supra,* 390 U.S. at 51. This record contains no fact tending to establish that appellant was aware of his right to object and thus the conclusion is impermissible that his declarations were "voluntarily entered upon a public record." *Stillman, supra.* The admission of the returns was thus error and, obviously, the information in them was highly prejudicial."

CONCLUSION

For the foregoing reasons, the petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, for the Seventh Circuit, entered in these proceedings.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 APRIL SESSION, 1973

No. 73-1055

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the) United States Dis-
v.	) trict Court for the) Southern District
ULESS GRANT MANSON, GEORGE JUNIOR BLAKEY, *Defendants-Appellants.*	) of Indiana, Indian-) polis Division.) No. IP 72 CR 29) Cale J. Holder,) Judge.

ARGUED JUNE 13, 1973—DECIDED APRIL 9, 1974

Before FAIRCHILD, Circuit Judge; SPRECHER, Circuit Judge; and GRANT, Senior District Judge.

GRANT, Senior District Judge. The appellants and several other defendants were indicted as joint participants in an Indianapolis gambling operation. Count I charged that the appellants and seven other defendants engaged in

a conspiracy to conduct an illegal business in violation of 18 U.S.C. 371. Count II charged that the appellants and six of the other defendants engaged in the same illegal gambling business in violation of 18 U.S.C. 1955. Prior to trial the indictment was dismissed as to the one defendant who was charged only Count I and as to another defendant who was charged in both Courts I and II, thus leaving seven named defendants in each Count. Appellants Blakey and Manson were tried and found guilty on both counts. In their appeal the appellants challenge; (1) whether the income tax return of an employee of the gambling business should have been admitted in evidence; (2) the constitutionality of 18 U.S.C. 1955; (3) whether this was an illegal gambling business "conducted by five or more persons" within the meaning of 18 U.S.C. 1955; and (4) whether the two counts properly charged two separate offenses.

I

Appellants assert that the trial court violated their Fifth Amendment privilege against self-incrimination when it received into evidence the 1971 Federal Income Tax Return of Irvin Kelly who was alleged to be an employee in the illegal gambling business in question. The return had been obtained from Mr. Kelly by subpoena and was introduced into evidence through the testimony of the accountant who had prepared the return from a W-2 Form and information which had been supplied by appellant Manson.

It is evident that the appellants had no standing to object to the introduction of Mr. Kelly's tax return for the reason that the privilege against self-incrimination is personal and cannot be exercised by anyone other than the person to whom the material in question belongs. HOWARD v. UNITED STATES, 397 F.2d 72, 74 (9th Cir. 1968), and Silbert v. United States, 289 F.Supp. 318, 320-321, 325 (D.

Md. 1968). Nor does the fact that Appellant Manson supplied the information contained on the return of their accountant, in order to comply with tax requirements in the operation of a business, give appellants any standing to object to the introduction of the return. The privilege against self-incrimination is not available to those who turn material over to a retained accountant for the purpose of disclosure in the preparation of tax returns. Couch v. United States, 409 U.S. 322, 337 (1973) (Justice Brennan concurring).

The return contained statements that Mr. Kelly's principal business activity was "Commission sales" the name of the business was "Uless Manson 35 886P" and the business address was 437 W. North St., Indianapolis, Indiana."

II

Appellants argue that 18 U.S.C. 1955 is unconstitutional the reason that it prohibits gambling businesses, such as the one which they were allegedly involved in, which do not affect interstate commerce. Admittedly, there was no evidence introduced at trial which would indicate that the appellants' gambling activities had any effect whatsoever on interstate commerce. However, accepting the government's interpretation of the facts, the gambling business which the appellants were involved in was large enough to come within the prohibition of 18 U.S.C. 1955. That statute provides in pertinent part, as follows:

> 1955. Prohibition of illegal gambling business
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. 84 Stat. 922, 937.

This statute was based on a broad finding by Congress that the gambling enterprises described in the statute have sufficient impact on the interstate economy to warrant prohibition by federal criminal legislation. See 84 Stat. 936. This circuit has held that such finding is sufficient to constitutionally support the statute even when it is applied to individual members of the class whose own activities may not have a demonstrable impact on interstate commerce. United States v. Hunter, 378 F.2d 1019, 1021 (7th Cir. 1973), cert. denied, 414 U.S. 857. This position has been previously adopted in each circuit which had been presented with the issue. United States v. Harris, 460 F.2d 1041, 1043-1048 (5th Cir. 1972), cert. denied, 409 U.S. 877; United States v. Palmer, 465 F.2d 697 (6th Cir. 1972), cert. denied, 409 U.S. 874; United States v. Becker, 461 F.2d 230, 233-234 (2nd Cir. 172); United States v. Riehl, 460 F.2d 454, 458 (3rd Cir. 1972); Schneider v. United States, 459 F. 2d 540 (8th Cir. 1972).

III

The appellants have also contended that evidence failed to establish that there were five or more persons who con-

ducted, financed, managed, supervised, directed or owned all or part of the business in question as required to constitute a violation of 18 U.S.C. 1955. The parties agree that *from the evidence, only the appellants themselves* could have been said to have financed, managed, supervised, directed or owned all or part of the business. Appellants argue that these other persons could not be counted as part of the "five or more persons who conduct, finance, manage, supervise, direct, or own all or part" of the illegal gambling business as required by 18 U.S.C. 1955. However, this court has recently held that such "street level employees" as ticket sellers and runners are to be counted as persons who "conduct" the illegal gambling business as provided in the statute. Hunter, supra, 478 F.2d at 1021. Accordingly, we conclude that the evidence did establish the existence of the required number of persons to constitute a violation of 18 U.S.C. 1955.

IV

Finally, the appellants contend that convictions on both Counts cannot stand because they do not charge separate offenses. Clearly, two offenses can only be separately prosecuted and punished if each requires proof of an element which the other does not. In this action, Count I charged that the appellants and other defendants conspired to engage in an illegal gambling business, in violation of 18 U.S.C. 371. Count II charged that the appellants and other defendants engaged in an illegal gambling business, in violation of 18 U.S.C. 1955. Seven defendants were tried and convicted on each count.

Some circuits have found that where more the five persons were charged with both conspiracy to violate 18 U.S.C. 1955 and a substantive violation of 1955, the offenses were

separate and both offenses could be prosecuted. However, in a case where there were thirteen persons charged with both conspiracy to violate 1955 and substantive violation of the statute, this circuit has recently rejected that argument and pointed out:

> . . . an argument which merely emphasizes the number of persons charged in the indictment does not identify an element of each offense which adequately differentiates the other . . . but even though five or more persons are named in the indictment, a charge of conspiracy to violate 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself. Hunter, supra, 478 F.2nd at 1026.

As in Hunter, we find here "no ingredient in the conspiracy [charged in Count I] which is not present in the completed crime [charged in Count II]."

The judgments of conviction against appellants in Count I are reversed. In all other respects the judgments against appellants are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit.

United States v. Becker, supra, 461 F.2nd at 234.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 19, 1974

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. ROBERT A. GRANT, Sr. District Judge

UNITED STATES OF AMERICA,	) Appeal from the
	) United States Dis-
Plaintiff-Appellee,	) trict Court for the
	) Southern District
v.	) of Indiana, Indian-
	) apolis Division.
ULESS GRANT MANSON and	)
	) (IP 72 CR 29)
GEORGE JUNIOR BLAKEY,	)
	)
Defendants-Appellants.	)

On consideration of the petition for rehearing filed in the above-entitled cause.

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2040

ULESS GRANT MANSON AND
GEORGE JUNIOR BLAKEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government's use of an employee's tax record prepared by an accountant from information furnished by petitioner Manson in compliance with federal income tax laws violated their Fifth Amendment privilege against self-incrimination, and that the proscriptions of 18 U.S.C. 1955 could not constitutionally reach their wholly intrastate gambling operations.

After a non-jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of conspiracy to conduct and conducting an illegal gambling business in violation of 18 U.S.C. 371 and 1955. Each was sentenced to concurrent terms of three years' imprisonment. All but two months of petitioner Manson's sentence was suspended; he was fined $5,000 on each count. All but one month of petitioner Blakey's sentence

was suspended; he was fined $3,000 on each count. The court of appeals reversed petitioners' convictions on the conspiracy count and affirmed on the substantive count[1] (Pet. App. A; 494 F. 2d 804).

The evidence showed that petitioner Manson owned a variety store in Indianapolis, Indiana, which was being used by him and petitioner Blakey to conduct a gambling operation (Tr. 32-33, 39-40, 107-112, 264, 318, 478, 707-709).[2] The operation had nine employees, including Blakey, who served as manager (Tr. 484). Receipts averaged $5,000 per day (Tr. 482).

One of the employees, Irvin Kelly, furnished a copy of his 1971 federal income tax return and of a W-2 Form. These reflected that Kelly's principal business activity was that of "commission sales,"[3] that Manson was his employer, and that the address of his employer's place of business was Manson's variety store (Pet. App. A 2-3). The tax records had been prepared by an accountant,

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[1]In reversing the convictions on the conspiracy count, the court of appeals stated that the counts were duplicitous because there was no ingredient in the conspiracy count that was not present as well in the completed crime. While the question whether one can be convicted of conspiracy and a substantive violation of 18 U.S.C. 1955 is presently before this Court in *Iannelli* v. *United States*, No. 73-64, certiorari granted, May 28, 1974, in light of the imposition of equal concurrent sentences on the two counts here, we have not sought certiorari to review the Seventh Circuit's reversal of the conspiracy conviction.

[2]We are lodging with the Clerk of this Court the five-volume transcript of trial ("Tr.").

[3]Kelly collected numbers wagers from bettors on the street and was permitted to retain 10% of his collections (Tr. 826-827). His reported "commissions" in 1971 amounted to $10,955 (Tr. 870).

Gerald Smith, from information furnished by petitoner (Tr. 707-709).

1. Petitoners claim that their Fifth Amendment privilege against self-incrimination was violated by the government use of those tax records because petitioner Manson was required by law to make the disclosures contained therein.[4] The scope of the privilege, however, does not extend to information identifying an employer on a federal income tax return. Such data is a necessary incident of a lawful regulatory scheme not directed at an inherently suspect class of individuals. See *California* v. *Byers*, 402 U.S. 424; *Mackey* v. *United States*, 401 U.S. 667, 702-713 (Brennan, J., concurring).

Moreover, the data used by the government were not obtained from petitioners, but were obtained from a government witness. The information was contained in records that had been prepared by Smith, a self-employed accountant, and then sent to witness Kelly. Petitioners cannot invoke the privilege against self-incrimination to prevent the production of witness Kelly's tax records that are in his own possession. "[T]he Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States*, 409 U.S. 322, 328.

Petitioners' reliance upon *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, is misplaced. In *Marchetti* and in *Grosso* this Court held that an individual who failed to comply with the registration

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[4]Although petitioners jointly assert a violation of the Fifth Amendment privilege, it is apparent that Blakey has no standing to raise this issue, since there is no evidence whatsoever connecting him to the federal income tax records in question. *United States* v. *Goodwin*, 470 F. 2d 893, 903 (C.A. 5), certiorari denied, 411 U.S. 969.

requirements of the federal wagering tax laws could invoke the Fifth Amendment privilege as a complete defense against prosecution for such noncompliance. The Court reasoned that the privilege was available because the requirements for registration and payment of the wagering tax would have had the "direct and unmistakable consequence of incriminating petitioner * * *." *Marchetti, supra,* 390 U.S. at 49. Unlike the *Marchetti-Grosso* situation, however, the instant case involves information sought pursuant to an essentially noncriminal regulatory scheme directed at the public at large. See *Shapiro* v. *United States*, 335 U.S. 1, 32-35. Registration and payment ordinarily would not incriminate a taxpayer. "Once the reason for the privilege ceases, the privilege ceases." *Ullmann* v. *United States*, 350 U.S. 422, 439; *California* v. *Byers, supra*; *Mackey* v. *United States, supra.*[5]

2. Petitioners next contend that 18 U.S.C. 1955 cannot constitutionally reach their wholly intrastate operations. The fact that petitioners themselves were not engaged in interstate activities, however, does not preclude federal prosecution. The test for the reach of the federal government's authority over commerce is whether a class of activity affects interstate commerce. "Where the *class of activities* is regulated and that *class* is within the reach of

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[5]*Garner* v. *United States*, cited by petitioner (Pet. 9-10), is an unreported pre-*Couch* opinion, wherein a majority of a panel of the Ninth Circuit held that a taxpayer could successfully invoke the Fifth Amendment privilege to prevent the government from using his income tax returns as evidence against him in a criminal prosecution unrelated to income tax laws, and was affirmed *en banc*, April 11, 1974, petition for a writ of certiorari now pending, No. 74-100. Even assuming *arguendo* its correctness in the face of *California* v. *Byers* and *Mackey*, and its questionable reliance upon *Marchetti*, the *Garner* decision is factually distinguishable from the instant case since we are not here concerned with petitioners' personal returns.

federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. *Maryland* v. *Wirtz*, 392 U.S. 183, 193." *Perez* v. *United States*, 402 U.S. 146, 154.

Prior to enacting 18 U.S.C. 1955 as part of the Organized Crime Control Act of 1970, Congress determined that the gambling activities of which petitioners were a part have a serious impact on interstate commerce. 84 Stat. 922. Accordingly, convictions under Section 1955 do not require a showing in each individual case that the gambling activities of particular defendants affected commerce. *United States* v. *Marrifield*, 496 F. 2d 1278 (C.A. 5); *United States* v. *Hunter*, 478 F. 2d 1019 (C.A. 7), certiorari denied, 414 U.S. 857; *Schneider* v. *United States*, 459 F. 2d 540 (C.A. 8), certiorari denied, 409 U.S. 877.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10